

IN THE SUPREME COURT OF OHIO

MICHAEL KOZAK, III,)	Supreme Court No. 2008-0415
)	
Plaintiff-Appellee,)	On appeal from the Cuyahoga County
)	Court of Appeals
v.)	Eighth Appellate District
)	
GEORGIANN JACKSON)	
)	Appellate Court No. <u>CA-06-088851</u>
Defendant-Appellant)	

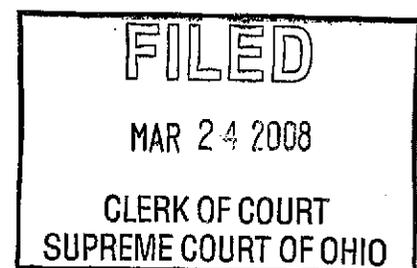
APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT
GENERAL INTEREST. IT DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION.**

The Appellate Court decision in *Kozak v. Jackson* has no public or great general interest. This affirmation of a Probate Court decision involves no substantial constitutional question. Appellant Georgiann Jackson's application is an attempt to elevate a family dispute over the interpretation of a badly written document into a matter of great general concern. The real issue in the appeal and this application is the decision made by Jackson to refrain from putting on a case at the trial of this matter: a strategy she now regrets.

Jackson did not offer evidence at the trial court level in contradiction to the evidence presented by Appellee Kozak. Jackson argues that she thought that the magistrate's pre-hearing rulings on Jackson's motion in limine superseded the evidentiary rulings made during the trial.

Well established law concerning motions in limine shows that she is mistaken. The Appellate Court's affirmation of that law does not raise a matter of public or great general interest.

Jackson has not raised any constitutional question whatsoever.

STATEMENT OF THE CASE

Jackson's Application is an appeal from an action for Declaratory Judgment before the Probate Court. Kozak asked the Probate Court to declare a Statement dated July 18, 1999 to be a contract or an enforceable promise.

Michael and Ann Kozak died two weeks apart; on June 16, 1999 and June 30, 1999, respectively. Their duplicate wills were filed with the Probate Court on August 20, 1999. Release of Assets was filed for Michael Kozak's estate on January 6, 2000. Entry relieving the Estate of Michael Kozak from administration was granted on February 15, 2000. Jackson was appointed Executrix of the Estate of Ann Kozak on January 31, 2000. Jackson filed the inventory and partial accounts as required. It is undisputed that Kozak had refrained from filing objections to the inventory and accounts because he believed his sister would honor the agreement they entered into on July 18, 1999. (TR p. 98, 128) After realizing that Jackson was not going to honor the agreement of July 18, 1999, in spite of her promises, Kozak filed a Complaint for Declaratory Judgment on April 29, 2005. Kozak filed an Amended Complaint on July 18, 2005. Jackson filed an Amended Motion to Dismiss on September 26, 2005, which was denied by the Court on December 5, 2005. Jackson filed an answer and counterclaim on December 28, 2005.

The magistrate's trial on the Declaratory Judgment action took place on March 2, 2006. Immediately prior to the trial, the magistrate considered the Motion in Limine filed by Jackson on February 24, 2006. The Motion in Limine was granted in part and denied in part. Kozak and Jackson stated objections to the magistrate's ruling on the Motion in Limine on the record prior to commencing the trial. The Report of Magistrate was filed April 3, 2006. Cross Objections were timely filed by the parties. The Probate Court held a hearing in chambers on July 21, 2006, in which the Probate Court heard arguments which were not recorded by a court reporter.

The trial court found in favor of Kozak on all claims and counterclaims. The trial court's orders were journalized on September 8, 2006. The trial court overruled the

Motion in Limine filed by Jackson. The trial court found that the Statement dated July 18, 1999 was an agreement between the parties to treat certain assets that were outside of the estate of Ann Kozak **as if** they were included in the estate. The trial court ordered that the value of the house, car and \$45,000 in cash be deposited into the estate along with applicable interest.

Jackson filed a timely appeal. The Appellate Court affirmed the trial court decision on January 10, 2008 and granted costs to Kozak. Jackson timely filed a Motion for Reconsideration, which was denied on February 18, 2008.

STATEMENT OF FACTS

The record reveals the following facts. Michael Kozak and Ann Kozak died within two weeks of each other in June 1999. During the following weeks, their adult children met at the Kozak home and began the tasks of clearing out and distributing tangibles and planning for the sale (TR. p. 86) of the home at 15684 Glenridge Ave., Middleburg Hts., OH, (TR pp. 94, 126) and the allocation of the 1996 Buick LeSabre, (TR. p. 127) intangible property and cash. The title to the house and the car and some cash had been transferred to Ms. Jackson prior to the death of Ann Kozak for perceived protection and convenience. (TR pp. 39, 41, 58-59, 119).¹

During the week of July 11, 1999 Kozak and Jackson and their respective spouses stayed in the house together and sorted through household contents (TR. pp. 87-88, 125) and discussed the extent of renovation or clean up required to sell the house and what price to set for the sale of the house. (TR pp. 31, 94) They also discussed who might

¹ Jackson has cited facts throughout her Memorandum in Support of Jurisdiction that are not found anywhere in the record. If she had a view alternative to Kozak's she should have testified at the trial.

take the 1996 LeSabre and how to allocate investments and intangibles. (TR pp. 44, 45, 102, 127). As the week drew to a close, Kozak suggested that an agreement be drawn up to memorialize the discussions (TR pp. 8, 12-14) concerning the distribution of some assets transferred by Ann Kozak prior to her death (TR. pp. 98, 126). Kozak was concerned that, because Jackson was in poor health, (TR p.170, 173) she might die before division of assets had taken place (TR. pp. 96-97, 127, 130); therefore, the parties entered into an agreement – the Statement dated July 18, 1999. The agreement was drafted and rewritten by Jackson’s husband and signed by Kozak and Jackson in front of other family members, without duress. (TR p. 39-40, 98, 100, 128) The signatures of Kozak and Jackson were also notarized. (TR pp. 54, 71-73) This agreement was not prepared by an attorney and is not in any format typically used by a lawyer for contracts. The agreement specifically describes the parties’ understanding to treat certain assets as if they were in Ann Kozak’s estate and to divide them equally, including the value of the house (confirming that a sale was contemplated) the car and a cash calculation. The assets were to be distributed “directly.” Since July 18, 1999 Jackson has sold the house and the LeSabre and holds funds mentioned in the agreement, but has not distributed any part of the proceeds to Kozak. The relief sought by Kozak was a determination that the Statement dated July 18, 1999 is a contract between interested parties in the administration of an estate or else a document constituting a promise made by Jackson on which Kozak relied.

Proposition of Law 1

The Appellate Court found substantial evidence of a contract in the record.

Ohio contract law is not jeopardized by the outcome of this case. There is no contractual issue of public or great general interest. Instead, the Appellate Court upheld a ruling on basic elements of contract law, including consideration.

The Appellate Court properly found that the Statement dated July 18, 1999 was a contract. There was ample testimony presented during the trial to satisfy the court that Kozak had provided consideration in exchange for the promises of Jackson.

[S]ubstantial evidence, including several documents as well as the testimony of Patricia Lawer, Roberta Kashi, Nicholas Kashi, Katherine Kozak, Michael Kozak III, and Wayne Jackson, was presented to the trial court. This evidence demonstrates that the July 18, 1999 writing was a contract to treat the house, car and cash as if they were in the estate and should be divided equally between the parties. Appellant [Jackson] failed to produce any evidence demonstrating that the lower court abused its discretion or acted improperly regarding these three items.

Kozak v. Jackson, 2008 Ohio 50 at ¶ 47.

The Statement dated July 18, 1999 is a contract. The parties to the contract are Jackson and Kozak, both having signed the agreement. Jackson promised to pay or distribute to her brother one half of the assets, or value of the assets, received by her through *intervivos* transfer from her parents. Kozak's consideration was forbearance from filing exceptions to the inventory, from filing a will contest, from filing exceptions to the Partial Accounts or from filing a concealment action. The language of the document was unartful, but the only interpretation available to the trial court was that of Kozak. Jackson offered no alternative interpretation; she did not testify. The parties clearly meant the Statement dated July 18, 1999 to be an enforceable document since they went through the formalities of witness and notarization.

Jackson previously affirmed Kozak's understanding of the Statement dated July 18, 1999, when she filed the statement of assets with the Probate Court on December 8,

2003 (Tr. Ex. 6). Trial Ex. 6, which was admitted over the objection of Jackson, lists the value of the house, the car and the funds as non-probate assets to be divided as if in the estate (that is, being divided equally between brother and sister, after expenses).

Proposition of Law 2 A ruling on a motion in limine is only a preliminary ruling.

Jackson has admitted choosing a strategy based on her interpretation of the magistrate's preliminary rulings rather than the actual evidentiary rulings made at trial. Jackson's misunderstanding of the law is not grounds for consideration by the Supreme Court.

The case law on the applicability of motions in limine is well-settled.

The ruling on a motion in limine is only a preliminary ruling. Not until the issue is raised at trial is the court's final determination made as to an evidentiary matter. This has been exhaustively discussed in *Cementech, Inc. v. City of Fairlawn* 2005-Ohio-1709 at ¶23:

{¶ 23} An Appellate Court need not decide the propriety of an order granting or denying a motion in limine unless the claimed error is preserved by an objection, proffer, or ruling on the record at the proper point during the trial. *Harbottle v. Harbottle*, 9th Dist. No. 20897, 2002-Ohio-4859, 2002 WL 31060237, at ¶ 55; *Garrett v. Sandusky* (1994), 68 Ohio St.3d 139, 141, 624 N.E.2d 704, citing *State v. Grubb* (1986), 28 Ohio St.3d 199, 202-203, 28 OBR 285, 503 N.E.2d 142. The necessity to preserve the claimed error results because a "ruling on a motion in limine is *only* a preliminary ruling." (Emphasis added.) *Dobbins v. Kalbaugh*, 9th Dist. Nos. 20714, 20918, and 20920, 2002-Ohio-6465, 2002 WL 31662749, at ¶ 20, citing *State v. Hill*, 75 Ohio St.3d 195, 202-203, 661 N.E.2d 1068, certiorari denied (1996), 519 U.S. 895, 117 S.Ct. 241, 136 L.Ed.2d 170. **Accordingly, when the trial court prohibits a party from presenting certain evidence at trial, this party must "seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal."**

Harbottle at ¶ 56, quoting *Grubb*, 28 Ohio St.3d 199, 28 OBR 285, 503 N.E.2d 142, paragraph two of the syllabus. (Emphasis added.)

The motion in limine had been granted in part and denied in part. The Magistrate ruled that there **could be** testimony regarding the Statement dated July 18, 1999 and regarding the cash amount of \$45,000.00. *Kozak v. Jackson*, at ¶25. Correctly, the Appellate Court stated that “It is illogical to assume that the July 18, 1999 document or ‘any testimony or argument at the upcoming hearing relating to any amount of cash or property transferred to any party by Ann Kozak’ could be discussed without addressing the actual content in the document.” *Kozak v. Jackson*, at ¶ 28.

During the course of the trial, evidence was presented by Kozak to which Jackson’s counsel objected and those objections were overruled. “...[T]he Magistrate permitted, over objection, evidence and testimony about the house and car on more than one occasion.” *Kozak v Jackson* 2008 Ohio 50 at ¶27.

Even if Jackson thought that the magistrate’s evidentiary rulings during trial were inconsistent with the preliminary ruling on the motion in limine, she needed to base her case on the actual rulings made during the course of trial and not on the preliminary rulings.

To counter the testimony of Kozak and the other witnesses as to the interpretation of the document and the disposition of the assets, Jackson needed to put on evidence about those subjects at the trial. She did not. She had the opportunity to listen to the testimony, make objections and plan her response. Although the magistrate allowed evidence related to the Statement dated July 18, 1999, the house and the car, Jackson elected not to testify regarding these issues. “Jackson’s reliance on the

magistrate's motion in limine ruling resulted in strategic decisions creating a significantly one-sided hearing" Application for Reconsideration p. 2. The Appellate Court did review a trial transcript with a one-sided presentation; it was one-sided at the choice of Jackson.

Proposition of Law 3 The declaratory judgment action is not a summary proceeding: the Probate Court has jurisdiction over declaratory judgment actions.

Contrary to the proposition of Jackson, the Appellate Court's affirmation of Probate Court jurisdiction in this case is not contradicted by the decisions cited from three other appellate districts and does not raise an issue of public or great general interest.

This is not a money judgment sought under ORC 2109.50 as in *Burns v. Daily* (1996), 114 Ohio App3d. 693 where the court did not take jurisdiction. Nor as in *Vogler v. Donley* (Dec. 16, 1998), 7th Dist. No. 97 BA 63 or *Harpster v. Castle* (June 28, 1993), 5th Dist. No. CA 6. All three of these cases were filed in the Probate Court as concealment actions, which, by their definition under ORC 2109.50, are summary proceedings to establish where estate assets may be found. All of these cases should have been filed in the general division of Common Pleas in order to be heard.

The complaint in this case is for a declaratory judgment, which is not a summary proceeding. The Probate Court has jurisdiction to hear a declaratory judgment complaint, pursuant to ORC 2101.24(A) (1) (l). At no point has Kozak said that the assets described in the Statement dated July 18, 1999 "belong" in the estate of Ann Kozak.

The Statement dated July 18, 1999, which has been determined to be a contract, is properly within the jurisdiction of the Probate Court. This issue is not grounds for review by this court.

Proposition of Law 4 The Probate Court has jurisdiction over declaratory judgment actions.

Again, contrary to the Memorandum in Support, the Appellate Court's ruling does not expand the Probate Court's jurisdiction, and therefore does not raise an issue of public or great general interest.

In *State ex rel. Lipinski v. Cuyahoga Cty. Court of Common Pleas, Probate Div.* (1995), 74 Ohio St.3d 19, 655 N.E.2d 1303, this Court states that "R.C. 2101.24(A)(1)(k) (now 2101.24(A)(1)(l)), 2721.03 and 2721.05(C) vests Probate Courts with jurisdiction over declaratory judgment actions upon questions relating to the administration of an estate." And the opinion goes on to say that, "it has been held that a declaratory judgment action may be brought in the Probate Court to determine the validity of intervivos transfers where the property transferred would revert to the estate if the transfers are invalidated" *State ex rel. Lipinski* at p. 22.

When the trial court denied Jackson's Motion to Dismiss, it found that it had jurisdiction to hear and determine the Declaratory Judgment action pending before it.

When the court reviewed the transcript of the trial the Probate Court determined that the Statement dated July 18, 1999, is a contract: a writing done in the context of the handling of the affairs of Ann Kozak after her death. The Statement sets forth the understanding between Kozak and Jackson that all net assets were to be distributed equally between the two, consistent with the terms of Ann Kozak's will. This Statement would not have been prepared, signed and notarized if Ann Kozak had not died. The assets would have been included in the probate estate but for the intervivos transfers.

Bobko v. Sagen (1989), 61 Ohio App.3d 397, held that ‘the question is whether the property transferred is related to the administration of an estate,’ *Bobko* at 406.

Quoting extensively from the case:

“The jurisdiction of the probate court is defined by R.C. 2101.24 which provides in pertinent part:

‘(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute.’

“Further, R.C. 2721.03 provides in pertinent part:

‘Any person interested under a deed, will, **written contract, or other writing constituting a contract...**may have determined any question of construction or validity arising under such ...contract...and obtain a declaration of rights, status or other legal relations thereunder.’

“In addition, R.C. 2721.05 provides that:

‘Any person **interested as or through an executor...or** other fiduciary...devisee, legatee, **heir, next of kin...**in the administration of...the estate of a decedent, may have a declaration of rights or legal relations in respect thereto in any of the following cases:

‘(C) To determine **any question arising in the administration of the estate...**including the construction of wills and **other writings.**’” (Emphases added)

“These statutes, taken together, allow one interested in the administration of an estate to bring a declaratory judgment action in the probate court to have written instruments potentially affecting the rights and property which are the subject of an estate considered. *Corron v. Corron* [1998] 40 Ohio St.3d at 78, 531 N.E.2d at 711.”

Kozak is a person interested in the administration of this estate; he is an heir and next of kin of Ann Kozak; he is acting through Jackson as Executrix; he is interested in the Statement dated July 18, 1999 as a party and as a beneficiary; the writing highlights questions in the administration of the Estate of Ann Kozak; and he is entitled to a construction of the writing.

Another reason that the Probate Court had jurisdiction is that the contents of the writing follow the dictates of the Will; the assets concerned are to be divided equally

between the two children, Jackson and Kozak. *Zuendel v. Zuendel* (1992), 63 Ohio St.3d 733, 590 NE2d 1260, also *Wozniak v. Wozniak* (1993) 90 Ohio App.3d. 400, 407-408, 629 N.E.2d 50.

In Re Estate of Harmon (In the Matter of: The Estate of Victor Lee Harmon) Ohio App, 4 Dist., 1994, 1994 WL 720293, the court found it did not have jurisdiction over a claim for specific performance for funds awarded as a wrongful death payment under the Federal Employer's Liability Act. Such a settlement would have been litigated in the Common Pleas Court and then approved by the Probate Court under a wrongful death petition.

This case is not a claim for specific performance under a contract. It is an action for declaratory judgment of a writing that relates to the administration of an estate.

In its review of the transcript and exhibits the trial court correctly found that the assets described in the Statement dated July 18, 1999 should be treated as if in the estate, in accordance with the agreement of the parties.

The Probate Court followed well settled law in rendering its decision; this is not an issue of public or great general interest or a constitutional question.

Proposition of Law 5 The lower court's ruling has not invalidated a deed or any other contract.

Neither the trial court nor the Appellate Court has made any findings concerning non-parties' contradicting a contract. Jackson's argument that the lower court's ruling somehow invalidates the deed to the house is simply not consistent with the facts. The deed conferred title on Jackson. This is not in dispute. Jackson subsequently sold the house to an unrelated third party. This is also not in dispute. The issue before the court in the declaratory judgment action was the interpretation of the Statement dated July 18,

1999. The parties agreed to divide the proceeds of the sale of the house. There is no nullification of a deed, as suggested by Jackson. Jackson's statement on page 13 of her Memorandum in Support of Jurisdiction that the Probate Court voided the deed is simply not supported in the record and therefore has no public or great general interest.

Proposition of Law 6 The Probate Court has not imposed new contract terms; the court has power to fully dispose of all matters before it.

The Probate Court fashioned a remedy that would accomplish the intent of the parties. It did not impose new terms into the contract. It could have directed that net proceeds be distributed equally to Jackson and Kozak. However, the net proceeds can only be known when all of the expenses associated with the sale of the house and car have been itemized. Prior to the filing of the declaratory judgment action, Kozak and Jackson were engaged in a dispute over the expenses being charged against the gross estate. Bringing the gross proceeds of the sales into the estate, so that the Court can determine the actual expenses to be charged against the gross proceeds of the house and car sales results in the greatest judicial economy, since it avoids another adversarial proceeding.

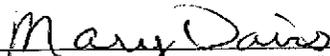
Quoting from *Harmon* "...our Probate Courts have primarily been responsible for the preservation and correct administration of property...belonging to estates....Of course...where a matter is properly before the Probate Court, that court has plenary power at law and in equity fully to dispose of it. ...That was the reason for the holding in *Fellers v. Belau* (Com Pl. 1961), 87 Ohio Law Abs. 54) that if the Probate Court has jurisdiction of a subject matter, it may, in the exercise of its plenary power, order a contract to be performed." At ¶ 3.

The order was one of prudence, providing for independent oversight of a distribution to be established between two disputatious parties. There is no public or great general interest.

CONCLUSION

For the reasons set forth above, Michael Kozak respectfully requests that this court deny this request for certiorari by Jackson.

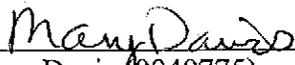
Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing *Opposition to Jurisdiction* was served upon Dean Boland, Attorney for Jackson Individually, 18123 Sloane Avenue, Lakewood, OH 44107, by regular U. S. Mail, postage prepaid, this 21st day of March, 2008.



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